

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.)
W.A. DREW EDMONDSON, in his)
Capacity as ATTORNEY GENERAL OF)
THE STATE OF OKLAHOMA and)
OKLAHOMA SECRETARY OF THE)
ENVIRONMENT C MILES TOLBERT,)
in his capacity as the TRUSTEE FOR)
NATURAL RESOURCES FOR THE)
STATE OF OKLAHOMA,)

Plaintiffs)

v.)

Case No. 4:05-cv-00329-GKF-SAJ

TYSON FOODS, INC.,)
TYSON POULTRY, INC.,)
TYSON CHICKEN, INC.,)
COBB-VANTRESS, INC.,)
AVIAGEN, INC.,)
CAL-MAINE FOODS, INC.,)
CAL-MAINE FARMS, INC.,)
CARGILL, INC.,)
CARGILL TURKEY PRODUCTION, LLC,)
GEORGE'S, INC.,)
GEORGE'S FARMS, INC.,)
PETERSON FARMS, INC.,)
SIMMONS FOODS, INC.,)
WILLOW BROOK FOODS, INC.,)

Defendants)

SIMMONS FOODS, INC.'S ANSWER
TO PLAINTIFFS' SECOND AMENDED COMPLAINT

For its Answer to Plaintiffs' Second Amended Complaint, Simmons Foods, Inc.

("Simmons") states:

The answering Paragraphs are numbered to correspond to those of the Second Amended Complaint.

1. The bulk of this Paragraph contains inflammatory rhetoric to which no answer is required. To the extent that an answer is required, Simmons denies that it is “legally responsible” for the farming activities of its independent contractor growers who own land, raise chickens, and typically perform other agricultural activities in the Illinois River Watershed. Simmons denies that its “practice” is “to store and dispose of chicken litter on the lands within the IRW.” Simmons denies that the land application of poultry litter standing alone has caused injury to the waters of the IRW. Simmons denies that it has caused injury to the waters of the IRW. Simmons denies that “the State of Oklahoma” has brought this action, rather, Drew Edmondson has inappropriately, and in bad faith, initiated the filing of this action after having isolated other responsible Oklahoma policymakers from the decision to bring this litigation. Simmons admits that it owns chickens which are raised by independent farmers located in the IRW. To the extent the allegations of Paragraph 1 require additional response, they are denied.

2. Simmons admits that Plaintiff asserts claims under “CERCLA” but denies that this Court has jurisdiction under CERCLA.

3. Simmons admits that the Illinois River Watershed (“IRW”), including the lands, waters, and sediments therein, is situated, in part, in the Northern District of Oklahoma and in part in the State of Arkansas. The remaining allegations in Paragraph 3 of the Second Amended Complaint state conclusions of law to which no response is required. To the extent a response is required, Simmons denies the remaining allegations in Paragraph 3.

4. The allegations in Paragraph 4 of the Complaint state conclusions of law to which no response is required. To the extent a response is required, Simmons denies the allegations in Paragraph 4 inasmuch as they relate to Simmons. Simmons lacks sufficient knowledge or information to admit or deny the allegations in Paragraph 4 inasmuch as they relate to the other Defendants.

5. Simmons admits that Oklahoma is a state of the United States of America. All other allegations of paragraph 5 are denied.

6. The allegations of Paragraph 6 are not applicable to Simmons.

7. The allegations of Paragraph 7 are not applicable to Simmons.

8. The allegations of Paragraph 8 are not applicable to Simmons.

9. The allegations of Paragraph 9 are not applicable to Simmons.

10. The allegations of Paragraph 10 are not applicable to Simmons.

11. The allegations of Paragraph 11 are not applicable to Simmons.

12. The allegations of Paragraph 12 are not applicable to Simmons.

13. The allegations of Paragraph 13 are not applicable to Simmons.

14. The allegations of Paragraph 14 are not applicable to Simmons.

15. The allegations of Paragraph 15 are not applicable to Simmons.

16. The allegations of Paragraph 16 are not applicable to Simmons.

17. In response to the allegations of Paragraph 17, Simmons admits that it is an Arkansas corporation with its principal place of business in Siloam Springs, Arkansas. Simmons further admits that it is engaged in poultry operations. All other allegations of Paragraph 17 are denied.

18. The allegations of Paragraph 18 are inapplicable to Simmons.

19. No answer is required.

20. No answer is required.

21. Admitted.

22. Admitted except Plaintiff has misstated the name of Barren Fork Creek, calling it a “river.”

23. The allegations of Paragraph 23 are conclusions of law and require no answer.

24. In response to the allegations of Paragraph 24, Simmons admits that the Illinois River is used for recreation and for fish and wildlife propagation. Simmons lacks sufficient knowledge with which to admit or deny the remaining allegations of Paragraph 24.

25. In response to the allegations of Paragraph 25 Simmons admits that the Illinois River feeds into Tenkiller Lake. Simmons lacks sufficient knowledge with which to admit or deny the remaining allegations of Paragraph 24.

26. In response to the allegations of Paragraph 26, Simmons admits that the Illinois River is used for recreation. Simmons lacks sufficient knowledge with which to admit or deny the remaining allegations of Paragraph 26.

27. Simmons lacks sufficient knowledge with which to admit or deny the allegations of Paragraph 27.

28. The allegations in Paragraph 28 are conclusions of law and require no response. To the extent a response is required, Simmons denies the allegations of Paragraph 28.

29. The allegations in Paragraph 29 are conclusions of law and require no response. To the extent a response is required, Simmons denies the allegations of Paragraph 29.

30.

30. Denied.

31. In response to the allegations of Paragraph 31, Simmons admits that it is in the business of producing poultry products. All other allegations of Paragraph 31 directed at Simmons are denied. Simmons lacks sufficient knowledge with which to admit or deny the allegations of paragraph 31 as to the other Defendants.

32. All allegations of Paragraph 32 directed at Simmons are denied. Simmons lacks sufficient knowledge with which to admit or deny the allegations of paragraph 32 as to the other Defendants.

33. Simmons denies that it “raises its birds itself.” Simmons “raises” no birds. All other allegations of Paragraph 33 directed at Simmons are denied. Simmons lacks sufficient knowledge with which to admit or deny the allegations of paragraph 33 as to the other Defendants.

34. Denied.

35. In response to the allegations of Paragraph 35, Simmons admits that to the extent birds are raised under a contract between it and an independent third-party farmer, the birds are grown to a certain age pursuant to the terms of the contract. Simmons further states that the contracts speak for themselves. All other allegations of Paragraph 35 directed at Simmons are denied. Simmons lacks sufficient knowledge with which to admit or deny the allegations of paragraph 35 as to the other Defendants.

36. Simmons admits the allegations of Paragraph 36 as to itself. Simmons lacks sufficient knowledge with which to admit or deny the allegations of paragraph 36 as to the other Defendants.

37. Simmons admits the allegations of Paragraph 37 as to itself. Simmons lacks sufficient knowledge with which to admit or deny the allegations of paragraph 37 as to the other Defendants.

38. In response to the allegations of Paragraph 38, Simmons admits that it provides and owns the feed that is fed to its birds during the growing process. All remaining allegations of Paragraph 38 directed at Simmons are denied. Simmons lacks sufficient knowledge with which to admit or deny the allegations of paragraph 38 as to the other Defendants.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. The allegations of Paragraph 44 directed at Simmons are denied. Simmons is without sufficient knowledge to admit or deny the allegations of Paragraph 44 with regard to the other Defendants.

45. In response to the allegations of Paragraph 45 of the Complaint, Simmons denies that poultry litter is “waste.” Simmons is without sufficient knowledge to admit or deny the remaining allegations of Paragraph 45.

46. Denied.

47. Simmons denies both knowledge of the allegations contained in Paragraph 47 as well as the allegations themselves.

48. In response to the allegations of Paragraph 48, Simmons denies that utilization of the word “waste” to describe poultry litter is appropriate. Simmons admits that poultry litter has been utilized as an inexpensive and effective organic fertilizer by many people within the watershed, principally for the purpose of growing forage for the generation of hay and the propagation of cattle pastures. All of such activities are legal, in accord with Oklahoma law, historically pursued and beneficial to the Oklahoma public.

49. Denied.

50. Denied.

51. Denied.

52. Denied.

53. Denied.

54. Denied.

55. Denied.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

60. Denied.

61. Denied.

62. Denied.

63. Denied.

64. Denied.

65. Denied.

66. Admitted.

67. Denied.

68. Denied.

69. The allegations of Paragraph 69 require no response.

70. Denied.

71. Denied.

72. Denied.

73. Denied.

74. Denied.

75. Denied.

76. Denied.

77. The allegations of Paragraph 77 require no response.

78. Simmons lacks sufficient information to admit or deny the allegations of Paragraph 78.

79. Denied.

80. Denied.

81. Denied.

82. Denied.

83. Denied.

84. Denied.

85. Denied.

86. Denied.

87. Denied.

88. Denied.

89. The allegations of Paragraph 89 require no response.

90. Receipt of the described letter is admitted. The notion that federal statutes and regulations are “applicable” to the claims of this lawsuit is denied.

91. Denied.

92. Denied.

93. Denied.

94. Denied.

95. Denied.

96. Denied.

97. The allegations of Paragraph 97 require no response.

98. Denied.

99. Denied.

100. Denied.

101. Denied.

102. Denied.

103. Denied.

104. Denied.

105. Denied.

106. Denied.

107. Denied.

108. The allegations of Paragraph 108 require no response.

109. Denied.

110. Denied.

111. Denied.

112. Denied.

113. Denied.

114. Denied.

115. Denied.

116. Denied.

117. Denied.

118. The allegations of Paragraph 118 require no response.

119. Denied.

120. Denied.

121. Denied.

122. Denied.

123. Denied.

124. Denied.

125. Denied.

126. Denied.

127. The allegations of Paragraph 127 require no response.

128. Denied.

129. Denied.

130. Denied.

131. Denied.

132. The allegations of Paragraph 132 require no response.

133. Denied.

134. Denied.

135. Denied.

136. The allegations of Paragraph 136 require no response.

137. Denied.

138. Denied.

139. The allegations of Paragraph 139 require no response.

140. Denied.

141. Denied.

142. Denied.

143. Denied.

144. Denied.

145. Denied.

146. Denied.

147. Simmons denies each and every allegation of the Second Amended Complaint other than those that are expressly admitted herein.

AFFIRMATIVE DEFENSES

148. Plaintiffs' Second Amended Complaint fails to state a claim upon which relief may be granted and must therefore be dismissed.

149. Plaintiffs' Second Amended Complaint fails to state a claim for relief under CERCLA in that it does not allege the release or threat of release of any hazardous substance.

150. Plaintiffs' Second Amended Complaint fails to state a claim for relief under CERCLA because it does not allege the release or threat of release of any substance that is not subject to the fertilizer exemption of Section 101(22) of CERCLA, 42 U.S.C. §9601(22).

151. Plaintiffs' Second Amended Complaint fails to state a claim for relief under CERCLA because it does not allege the release or threat of any substance that is not subject to the exemption for federally permitted releases provided by Section 101(10) of CERCLA, 42 U.S.C. §9601(10).

152. Simmons Foods, Inc. has no liability under CERCLA in this matter because it does not fall within any of the four classes of persons who may have liability under Section 107(a) of CERCLA.

153. Simmons Foods denies that it is a responsible party under CERCLA; however, if Simmons Foods, Inc. did discharge any amount of hazardous substances, the amounts were insignificant and, therefore, under the principles of *de minimis non curate lex*, the CERCLA count of the Complaint should be dismissed.

154. The Court has no jurisdiction over Plaintiffs' CERCLA claim, and the Plaintiffs are not entitled to recovery under CERCLA of any costs or expenses allegedly incurred by them in response to the alleged releases and discharges, because Plaintiffs have not complied with Section 113(1) of CERCLA and because any costs or expenses

incurred by Plaintiffs were neither necessary nor incurred consistent with the National Contingency Plan.

155. Plaintiffs are not entitled to recovery under CERCLA of any costs or expenses allegedly incurred by them in response to the alleged releases and discharges of wastes because the alleged releases and discharges occurred, if at all, through the acts or omissions of a third party or parties other than an employee or agent of Simmons Foods, Inc. and other than a third party whose acts or omissions occurred in connection with a contractual relationship with Simmons Foods, Inc., and Simmons Foods, Inc. exercised due care with respect to the wastes, taking their characteristics into consideration in light of relevant facts and circumstances, and taking precautions against foreseeable acts and omissions of such third party or parties and the consequences that could foreseeably result from such acts and omissions.

156. Any “response costs and expenses” allegedly incurred by Plaintiffs do not constitute costs of “response” as that term is defined by Section 101(25) of CERCLA, 42 USCA 9601(25) and any such costs and expenses were not incurred consistent with the national contingency plan promulgated by the United States Environmental Protection Agency (“USEPA”) pursuant to Section 105 of CERCLA, 42 USCA 9605.

157. Under the Supreme Court’s decision in *U.S. v. Key Tronic Corp.*, the Plaintiffs cannot recover those attorneys’ fees relating to their CERCLA claim.

158. The purported causes of the alleged contamination are divisible and there is a reasonable basis for apportioning the alleged harm. Accordingly, there is no basis for joint and several liability under CERCLA.

159. All chicken litter utilized as an organic fertilizer and generated by growers having contracts with Simmons Foods, Inc. is, on information and belief, disposed of through land application and other means that are fully in compliance with applicable law.

160. The products referenced in the Complaint are consumer products as defined in §101(9) of CERCLA.

161. The activities described in the Second Amended Complaint did not involve the arrangement for treatment or disposal of hazardous substances as defined by §107(a)(3) of CERCLA.

162. Simmons Foods, Inc. has not directly, or indirectly, disposed of any “hazardous waste” as that term is defined in the Solid Waste Disposal Act, as incorporated into CERCLA.

163. Plaintiffs have failed to mitigate their damages, thereby barring or diminishing any recovery.

164. Conduct of Simmons Foods, Inc. was not the proximate cause of any injuries or damages suffered by Plaintiffs.

165. The allegations set forth in Plaintiffs’ Second Amended Complaint do not establish a violation of any state or federal statute.

166. The conduct and conditions alleged by Plaintiffs in their Second Amended Complaint do not constitute a recurring and permanent nuisance.

167. The Plaintiffs’ nuisance claims are barred because Simmons Foods, Inc., as well as the independent third party farmers, has made reasonable use of their

respective properties and the social utility of utilizing poultry litter as fertilizer outweighs Plaintiffs' unfounded claim of harm.

168. The Plaintiffs do not state a cause of action for nuisance because the Plaintiffs have neither alleged nor suffered a particularized injury.

169. Plaintiffs' injuries and damages, if any, are the result of their own acts, omissions, carelessness and/or negligence, thereby barring or diminishing any recovery. Plaintiffs' negligence establishes their duty to prove their allegations against each of these Defendants severally.

170. Plaintiffs' injuries and damages, if any, are the result of the negligence or other fault of third persons or entities over which Simmons Foods, Inc. has no control.

171. None of the actions alleged to have been taken by Simmons Foods, Inc. constitutes negligence per se.

172. Plaintiffs' injuries and damages, if any, are the result of acts of God and/or other natural or artificial factors beyond Simmons Foods, Inc.'s control.

173. The Plaintiffs' claims are barred under the doctrine of assumed or incurred risks.

174. Plaintiffs' claims are barred by the applicable statutes of limitation.

175. The issues and/or claims asserted by Plaintiffs are barred by the doctrines of laches, waiver and unclean hands.

176. Simmons Foods, Inc. has not been unjustly enriched by any conduct alleged.

177. The independent third party farmers who raise poultry under contract with Simmons are not, as a matter of law, agents or employees of Simmons.

178. Simmons Foods, Inc. neither owns nor operates the facilities of the independent third party farmers who raise poultry under contract with it.

179. Simmons Foods, Inc. has neither the ability nor authority to control or affect the timing, manner and location of the land application of poultry litter.

180. To the extent Plaintiffs attempt to characterize the time period encompassed by the allegations in the Second Amended Complaint as a period of continuing violations, said characterization is incorrect and should be stricken and dismissed.

181. All allegations in the Second Amended Complaint which attempt to assert Plaintiffs' right to recovery due to purported violations, directly or indirectly, of the general water quality criteria in the Oklahoma Administrative Code should be stricken and dismissed for failure to state a claim, because: (a) the general criteria are not enforceable in that they are void for vagueness; (b) no scientific assessment has been performed to determine whether the general criteria were violated; and (c) no showing has been made or can be made to establish that Simmons Foods, Inc. caused violations of the general criteria.

182. To the extent Plaintiffs are asserting any claims due to purported violations of numeric or specific water quality criteria, such allegations should be stricken and dismissed for failure to state a claim because the numeric or specific criteria do not apply.

183. No relief should be awarded to Plaintiffs because neither Plaintiffs nor any other agency has prepared Total Maximum Daily Loadings pursuant to the applicable

authorities of the Clean Water Act allocating loadings and/or waste loads for any of the water bodies referenced in the Complaint.

184. No relief should be awarded to Plaintiffs because Plaintiffs have not and cannot establish that any applicable water quality standard has been violated by Simmons Foods, Inc. or that Simmons Foods, Inc. has caused pollution to the water supply.

185. Damages should not be assessed against Simmons Foods, Inc. because, at all times relevant hereto, the potential for harm to Plaintiffs' water supply and the extent of deviation from any applicable requirements, if either could be shown, do not support an award of damages.

186. Plaintiffs cannot establish any compensable damages for the claims asserted in their Complaint.

187. No injunctive relief should be awarded because Plaintiffs have an adequate remedy at law.

188. No injunctive relief should be awarded because Plaintiffs have not suffered irreparable harm.

189. No injunctive relief should be awarded because Plaintiffs have not sued indispensable parties, i.e. all nutrient contributors in the watershed.

190. Based upon the allegations made by Plaintiffs in their Second Amended Complaint, no award of punitive damages is justified.

191. An award of punitive damages would violate provisions of the Constitution of the United States, including, but not limited to: Article I, Section 8; Article I, Section 9; Article I, Section 10; Article III, Section 2; and the Fifth, Sixth, Eighth and Fourteenth Amendments.

192. Plaintiffs have failed to join an indispensable party or parties.

193. Simmons Foods, Inc. adopts and incorporates by reference all affirmative defenses presently or subsequently asserted by any of its co-defendants.

193. Any recovery by Plaintiffs cannot be utilized to pay contingency attorney fees.

194. To the extent that liability under the Second Amended Complaint is predicated on the claim that independent poultry farmers are or were the servants, employees or agents of Simmons, all such claims are preempted by the provisions of the Packers and Stockyards Act, 7 U.S.C. §181, *et seq.*

195. The state common law claims of nuisance, trespass and unjust enrichment are precluded by the existence and provisions of the Oklahoma Registered Poultry Feeding Operations Act, OKLA. STAT., tit. 2 §9-201, *et seq.* and the Oklahoma Concentrated Animal Feeding Operations Act, OKLA. STAT., tit. 2 §9-201, *et seq.*

196. The Second Amended Complaint's claim for "cost recovery" under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601, *et seq.*, is barred by the Plaintiffs' status as a potentially responsible party.

197. The state law claims in the Second Amended Complaint are barred under the doctrines of state sovereignty and comity. The claims amount to an impermissible attempt by the State of Oklahoma to use its own common law tort theories of liability to restrict or modify the regulatory authority of the State of Arkansas, and to impose economic sanctions on the Defendants with the intent of changing Defendants' lawful conduct in the State of Arkansas.

198. The common law claims asserted in Counts 4, 6, and 10 of the Second Amended Complaint are precluded by Oklahoma's statutory and regulatory programs governing the conduct at issue.

199. The common law claims asserted in Counts 7, 8, and 9 are barred under the doctrine of primary jurisdiction.

200. Simmons is not associated with or affiliated with any of the other Defendants. Simmons has not otherwise acted in concert or combination with any other Defendant. The Second Amended Complaint improperly attempts to combine Simmons with the other Defendants under the designation, "Poultry Integrators." Simmons is not responsible for the actions of any of the other Defendants herein.

201. Some or all of Plaintiffs' claims are barred by Plaintiffs' failure to exhaust administrative remedies.

202. Some or all of Plaintiffs' claims are preempted by CERCLA and other provisions of law.

203. Plaintiffs' claim for "cost recovery" under CERCLA is barred because Plaintiff is a responsible party.

204. Plaintiffs lack standing to pursue a claim under RCRA.

205. Plaintiffs' claim under RCRA is barred because poultry litter used as fertilizer is not a "solid waste" within the meaning of RCRA.

206. Some or all of Plaintiffs' claims are barred because Plaintiffs consented to the activity that allegedly has caused harm.

207. Counts 1, 2, and 3 should be dismissed for failure to state a claim for which relief can be granted because poultry litter does not fall within the statutory or regulatory definition of “hazardous substance” or “hazardous waste.”

208. Counts 1 and 2 should be dismissed due to Plaintiffs failure to identify and describe a facility within the meaning of CERCLA.

209. Simmons has acted at all times in a reasonable and prudent manner and in accordance with industry standards, government requirements, and the prevailing state of the art and technology in the poultry industry.

210. Plaintiffs’ claims should be dismissed because the federal statutory schemes on which Plaintiffs base their claims do not apply to the application of poultry litter as fertilizer.

RESERVATION OF RIGHTS

211. Simmons Foods, Inc. reserves the right to assert any and all additional affirmative defenses which discovery may reveal to be appropriate.

212. Simmons Foods, Inc. reserves the right to amend its answer or otherwise plead in response to Plaintiffs’ Second Amended Complaint.

WHEREFORE, having fully answered, Separate Defendant, Simmons Foods, Inc., moves the Court for dismissal of the Second Amended Complaint; for its costs; for its attorneys’ fees; and for all other things to which it might show itself entitled.

s/John R. Elrod

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2007, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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and I hereby certify that I have mailed the document by the United States Postal Service to the following non CM/ECF participants:

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s/Vicki Bronson
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